



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-4704

JUN - 3 2004

MEMORANDUM FOR CIVILIAN AND MILITARY OFFICERS AND EMPLOYEES
ASSIGNED TO THE OFFICE OF THE INSPECTOR GENERAL OF
THE DEPARTMENT OF DEFENSE

SUBJECT: Release of Unclassified Records, including Electronic-Mail, to Congress

References: (a) Inspector General Act of 1978, as amended
(b) Inspector General Policy Memorandum, "Inspector General Act
Implementation and Office of Inspector General Policy Guidance
(Revision 1)," November 7, 2003
(c) through (o) (continued on second page)

Purpose: To establish a policy for the release of unclassified records of the Office of Inspector General of the Department of Defense (DoD), including electronic-mail (e-mails), to Congress.

Statutory Duty and Regulatory Responsibilities: Section 2 of Reference (a), implemented generally by Reference (b), directs the Inspector General "to provide leadership and . . . a means for keeping [the Secretary of Defense and] the Congress fully and currently informed about problems and deficiencies relating to the administration of [DoD] programs and operations and the necessity for and progress of corrective actions." Section 4(a)(5) of Reference (a) obligates the Inspector General "to keep [the Secretary of Defense and] the Congress fully and currently informed . . . concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by the [DoD]."

References (c) through (l) authorize the release of information to Congress based on the type of information requested, status of the requestor, and purpose of the request. References (m) through (o) prescribe Office of Inspector General policy related to release of information.

References (c) and (d) establish policy and procedures governing the provision of DoD information to Congress, to include individual Members of Congress, Committees, Subcommittees, and either House sitting as a whole. Reference (h) governs the marking, handling, and release of "for official use only" (FOUO) information, to include e-mail. Paragraph C4.1.1 of Reference (h) defines FOUO information as that which "has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public because disclosure would cause a foreseeable harm to an interest protected by one or more [Freedom of Information Act] Exemptions." In that regard, Paragraph C4.1.4 suggests that agency records (to include e-mail) containing FOUO information be marked appropriately at the time of their creation. Such markings may include a general FOUO designation as well as specific designations reflecting Freedom of Information Act exemptions, including but not limited to deliberative/predecisional "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" (Exception 5), privileged attorney-client communication (Exception 5, per Department of Justice FOIA Guide), and law enforcement sensitive "information that could reasonably be expected to interfere with enforcement proceedings" (Exception 7A).

Policy: It is the policy of this Office of Inspector General that all officers and employees assigned to this Office comply with References (c) through (o) with regard to the marking, handling, and release of unclassified records, including e-mail, to Congress. Moreover, it is the policy of this Office of Inspector General to instill discipline within our own officers and employees in order more effectively and efficiently to mark and otherwise to safeguard the confidentiality of communications, including e-mails, covered by Freedom of Information Act exemptions, such as deliberative/predecisional, attorney-client, and law enforcement sensitive.¹

Recognizing that marking communications and other official records, including e-mail, at the time of their creation (a) provides an additional level of protection by notifying readers of the FOUO content and respective need to safeguard the same from unauthorized disclosure, and (b) facilitates review when information is requested, it is nonetheless important to note the guidance in Reference (h), paragraph C4.1.4, that records, including e-mails, lacking such markings shall not be assumed releasable to Congress (or to the public generally) without examination for the presence of information that requires continued protection and qualifies as exempt from release.

Responsibilities: In order to ensure full and prompt response to Congressional requests for official records, including e-mail:

(1) whenever an OIG officer or employee corresponds through an unclassified written record, including e-mail, information that he or she believes should be exempt from congressional release (e.g., attorney-client communication, predecisional work products, law enforcement sensitive, or Privacy Act-protected content), that officer or employee shall identify the exception he or she believes applicable in the subject line of the written record, including e-mail, and mark each page, whenever practicable, as "For Official Use Only (FOUO)" (in the case of e-mail, this marking should be inserted in the subject line either manually or via a yet-to-be-developed Microsoft Outlook "macro");

(2) the senior counsel assigned to the Office of Inspector General shall review and maintain the legal currency of an OIG training program, subject to IG approval, to ensure that all OIG Officers and Employees are educated on the various possible statutorily-recognized exemptions to congressional disclosure;

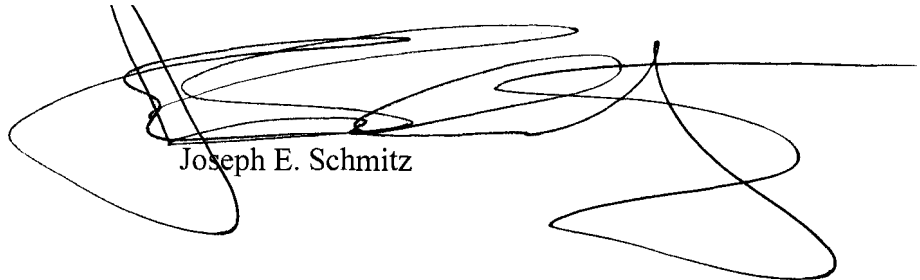
(3) the Assistant Inspector General, Communications and Congressional Liaison, in consultation with the senior counsel assigned to the Office of Inspector General, shall review all proposed releases of potentially exempted records, including e-mail, to Congress for compliance with statute, regulation, and this policy;

¹ Courts have repeatedly emphasized the need to aggressively assert privileges applicable to information. *Cf. In Re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) ("Although the attorney-client privilege is of ancient lineage and continuing importance, the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost 'even if the disclosure is inadvertent.' . . . In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels – if not crown jewels." (internal citations omitted))

(4) in those cases where there is a question whether arguably withholdable information contained in official records, including e-mail, should be released to Congress, the matter shall be referred to the Inspector General for prompt determination in accordance with Sections 2 and 4(a)(5) of Reference (a), implemented generally by Reference (b), and Paragraph 4.2.2 of Reference (c); and

(5) all official records, including e-mail, released to Congress in response to Congressional requests shall be transmitted under the signature of the Inspector General. Finally, in accordance with References (c) and (h) all information released to Congress shall be appropriately marked, and the receiving officials shall be informed of any special handling instructions, to include limitations on public release.

Effective date: This Policy Memorandum is effective immediately. The Deputy Inspectors General and the Chief of Staff will ensure that this policy is incorporated into publications under their cognizance.



Joseph E. Schmitz

References (continued):

- (c) DoD Directive 5400.4, "Provision of Information to Congress," January 30, 1978
- (d) DoD Directive 5142, "Assistant Secretary of Defense (Legislative Affairs)," June 14, 2000
- (e) Section 552 of Title 5, United States Code, as amended, "Freedom of Information Act"
- (f) Section 552a of Title 5, United States Code, as amended, "Privacy Act"
- (g) DoD Directive 5400.7, "DoD Freedom of Information Act Program," June 17, 2002
- (h) DoD 5400.7-R, "DoD FOIA Program," September 4, 1998
- (i) DoD Directive 5400.11, "DoD Privacy Program, December 13, 1999
- (j) DoD 5400.1 1-R, "DoD Privacy Program," August 1983
- (k) DoD 5200.1-R, "Information Security Program," January 1997
- (l) USD(1) Memorandum, "Interim Information Security Guidance," April 16, 2004
- (m) Inspector General Instruction 4630.1, "Electronic Mail Policy, " August 14, 2002
- (n) Inspector General Policy Memorandum 2003-14, "Public Release of Information from the Office of the Inspector General of the Department of Defense (OIG DoD)," June 27, 2003
- (o) Inspector General Policy Memorandum 2003-20, "Release of OIG Reports Containing Privacy Act Protected Information," August 29, 2003